United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. T-3313

Barbara Wisdom, et al
Plaintiffs, Appellees

v.

Nicholas Norton, et al
Defendants, Appellants

On Appeal From a Decision of the United States District Court, District of Connecticut

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BRIEF OF APPELLANT

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ISSUES PRESENTED

1. Does the word "child", as defined in 42 USC 606 (a), include an unborn human being so as to enable a pregnant woman, who is indigent and not living with her husband, to be eligible for Aid to Families with Dependent Children pursuant to Title IV of the Social Security Act?

2. Does the Connecticut Welfare Department's policy, which denies Aid to Families with Dependent Children to otherwise eligible pregnant women on the ground that the child has not yet been born, deny these women Equal Protection under the 14th Amendment, and does this policy conflict with Title IV (AFDC) of the Social Security Act?

3. The Plaintiffs presented no testimony on which the court could enter an order concerning the amount of payments to be made to the Plaintiffs and the class they represent.

STATEMENT OF CASE

The plaintiffs in the above-entitled matter claim that a pregnant woman, who is otherwise eligible for AFDC except for the fact that she does not have a child presently born, is entitled to all of the benefits of Title IV of the Social Security Act that are presently being given to indigent women whose husbands are not in the house and whose children have actually been born.

The factual situation in this case is as follows:

1. The three named plaintiffs did not testify at the hearing on the merits in the United States District Court on December 7, 1973, and no explanation was presented to the Court concerning their failure to testify.

2. There was no medical testimony presented by any doctors on December 7, 1973, that the named plaintiffs were not getting proper medical attention or proper nourishment for their pregnancies. (Transcript page 10, 11)

3. The plaintiffs, Tirado and Croe, who were on or eligible for general assistance, were entitled under that program for

shelter, food, clothing, personal needs, and all medical needs. (Transcript page 35, 36)

4. These plaintiffs were also entitled to additional clothing, if needed, vitamins, iron supplements, and a special diet allowance if recommended by their physician. (Transcript page 36, 38)

5. The plaintiff, Wisdom, who was on AFDC, was entitled to all obstetric and gynecological services plus medical services for the fetus if she had any particular worries or suspicions that there was anything wrong. (Transcript page 33)

6. She was also entitled to any special supplemental high diet if it were prescribed by her physician. (Transcript page 33, 34)

ARGUMENT

I.

THE WORD "CHILD" READ IN THE CONTEXT OF 42 USC 606 (a) AND OTHER SECTIONS OF TITLE IV OF THE SOCIAL SECURITY ACT CAN ONLY MEAN A PERSON ALREADY BORN.

A.

THE ORDINARY MEANING OF THE WORD "CHILD" DOES NOT INCLUDE AN *UNBORN HUMAN BEING.*

The only real issue in this civil action is how Congress meant to define the word "child" in 42 USC 606 (a), which is the particular section that defines what a "dependent child" is for purposes of AFDC. If this court finds that Congress actually intended the word "child" to include an unborn person, then the plaintiffs should prevail. On the other hand, if Congress intended that the word "child" meant only a child from birth to a particular age fixed by the statute, then the defendants should prevail.

The defendants agree that *some* dictionaries include the words "unborn or recently born human being" in their definition of child. *Websters Third International Dictionary* (1969). This same dictionary also includes as a definition of "corporation" the word "potbelly". However, the defendants believe that unless the context of the statute indicated the legislative body meant "potbelly" when using the word "corporation" in a particular statute, a court would be hard put to justify that particular definition when using the word "corporation" in its ordinary and every day sense.

The same logic should have applied in the lower court when defining "child" in the instant case. Using the rules of statutory construction, this court should be persuaded that Congress could only have meant the word "child" to include only those persons who were born. Unfortunately, the lower court and those courts which it cites in its decision give a seldom used definition of the word "child" in order to justify their result.

The rules of statutory construction are clear and precise. They state that words used by a legislative body are to be given their ordinary, well known, and usual meaning, unless from the context of the statute or chapter a different meaning was intended. It is the expressed written intent of the legislature, as it appears in the statute, that controls. If the meaning of the words are still unclear from a reading of the statute in its whole context, the court may then look elsewhere to find the legislative purpose at the time the bill was passed. But the court may only do so if the meaning of the words are still unclear. "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them." *DeGanay v. Lederer,* 250 U.S. 376, 381. *Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459, 465.

"Words in an act passed by Congress are to be given their ordinary meaning unless the context shows they are differently used." *Bailey v. Drexel Furniture Company,* 259 U.S. 20, 36. *United States v. Raynor,* 302 U.S. 540, 547-548.

It is extremely important when interpreting the statute that the court does not pick a definition which normally is

not used in order to reach a decision the court might think socially desirable.

"One definition of a word does not necessarily express its whole meaning or determine the intention of its use." *Osborne v. San Diego Land and Town Co.*, 178 U.S. 22, 38.

Using the above rules, the court should examine the word "child" to determine how Congress intended it to be defined in 42 USC 606 (a), and the court must do so presuming that Congressmen know the ordinary usual meaning of words.

The ordinary definition of the word "child" as it appears in all of the standard American dictionaries is usually defined as "a young person of either sex at any age less than maturity, but most commonly one between infancy and youth." *Websters Third International Dictionary* (1969).

All the dictionaries used this definition in substantially the same language. *The Random House Dictionary of the English Language* (1966), *Funk and Wagnalls Dictionary, International Edition* (1965), *The American Heritage Dictionary* (1969).

Approximately one half of the dictionaries *do not* contain a definition of "unborn or recently born human being" in their many definitions of the word "child", *Funk and Wagnalls* and *Random House* being examples.

Why *Websters* used the definition it did and in the sequence in which it did is easily illustrated. *Websters* usually lists its definitions in the same manner as does the *Oxford English Dictionary*, and in the latter in Volume II (1961) *Oxford* defines the word "child" in its first definition as an "unborn or recently born human being". This is because *Oxford* always puts the historical derivation first even if that definition is now obsolete, and "child" in Gothic was "kilpei" which meant "womb".

For example, *Websters* puts as its first definition for the word "contest" "to witness" which is also the first definition in *Oxford* and based again on historical derivation.

The defendants believe that this court can judicially notice that persons dealing in the ordinary affairs of everyday life seldom if ever use the word "child" when referring to the word "fetus", and certainly Congress must be presumed to have used the word "child" in its common ordinary everyday sense.

B.

THE CONTEXT OF 42 USC 606 (a) AND 42 USC 602 (b) CLEARLY INDICATE THAT CONGRESS MEANT ONLY PERSONS WHO WERE BORN WHEN DEFINING "CHILD".

The definition of "dependent child" in 42 USC 606 (a) states in part as follows: "The term 'dependent child' means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home . . ."

As the plaintiffs in this civil action are women, the dependent child in this instance is a needy child living with its mother.

The word "mother" in all the dictionaries previously mentioned in this brief is defined as either "a female who has borne a child" or "a female who has given birth to a child". In *none* of these dictionaries is a "mother" defined as a female who has conceived a child or a female who is pregnant with child. Therefore, a female does not gain the name mother until after the birth of the fetus.

It is abundantly clear that Congress in the context of the whole language of 42 USC 606 (a) did not intend to extend welfare benefits under Title IV (AFDC) to children until they were born. The only way the court can reach a different conclusion is by deciding that the members of Congress do not know the difference between the words conception and birth.

This court must also look to how Congress used the word "child" in other parts of the same title where the same definition would be applied. Section 602 (b) states as follows: "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was *born* within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the *birth*." (emphasis added)

Here the secretary would not approve a residency plan that excluded children who were born within one year immediately preceding the application if the parents with whom the child was living had lived in the State for one year immediately preceding the birth. If the lower court's interpretation was that Congress intended in 42 USC 606 (a) that "dependent child" included unborn children, it would follow that Congress in 42 USC 602 (b), in order to be consistent, should have used the words child who was conceived within one year and whose parents had lived in the State for one year immediately preceding the conception. It is very difficult to believe that Congress would intend a child to mean a fetus in 606 (a) and a live birth in 602 (b).

Even the language in the title of Subchapter IV "Aid to Families with Dependent Children" indicated Congress must have meant a living child. In all of the dictionaries previously cited, a family is defined in terms of a group of individuals living together. By no stretch of the imagination can the plaintiffs, Tirado and Croe, be considered as a group. Further, in the same subchapter, 42 USC 602 (a) (17) (i), the section dealing with the establishment of paternity, the statute talks about "in the case of a child born out of wedlock" not a child conceived out of wedlock.

In other titles of the act, where Congress has used the word "child" but not defined the word as to whether or not the child should be conceived or born, it is clear that the word

"child" means one that was born. In Title II of the Act, Congress has not defined child in 42 USC 402 (d) as to whether they wanted the insurance benefits to go to a pregnant widow or benefits to go only to a child after it was born. However, in interpreting 42 USC 402 (d) (10), which is now 42 USC 402 (d) (9), the court has held that the time limitation on adoptions for purposes of qualifying under the sub-chapter start at the date of birth and not conception. *Economy v. Gardner,* 286 F. Supp. 472, 272. Affirmed 396 F. 2d 115.

And finally in making the head count in 42 USC 702, Allotments to States, which is in Title IV, the head count for the sums appropriated are based on live births and not the number of conceptions.

C.

THE CONGRESSIONAL HISTORY OF TITLE IV OF THE SOCIAL SECURITY ACT CLEARLY AND SPEFICIALLY REFERRED TO A CHILD AS ONE WHO HAD BEEN BORN.

On several occasions when Congress was preparing to pass the Social Security Act, Congress clearly expressed its intention that where the word "child" appeared in Title IV it would mean a living child from birth to age 16.

On May 20, 1935, in a Joint Session of the 74th Congress Representative Ellenbogen said:

"The child welfare laws and public health measures which we pass should protect the child *from the day of his birth* until he reaches maturity." (Emphasis added) Congressional Record, Volume 79 Part 7 page 7838. 74th Congress 1st Session.

And again Mr. Ellenbogen, commenting on the Act on August 20, 1935, in discussing Dependent Children, said:

"The idea will be security of the individual from birth to death." Congressional Record, Volume 79 Part 13 page 13,678. 74th Congress 1st Session.

In discussing the Congressional Residency requirement for AFDC [42 USC 602 (b)], Mr. Randolph of the House of Representatives on August 20, 1935, stated:

"Payments: Amount to be fixed by state. Those who qualify: Children who have lived at least one year in the State immediately before making application; and *who were born* within the state one year immediately preceding application if the mother had resided in the state one year immediately preceding the birth." (Emphasis added). Congressional Record Volume 79 Part 13 page 13,881 74th Congress 1st Session.

In no debates nor in other legislative history can the defendant find any statement where any Congressman said a child was to be defined as a fetus.

Most importantly 42 USC 602 (b) still contains the language cited in Mr. Randolph's speech about a child "who was born".

Both the clear language and history of the Act support the defendant's position.

II.

THE COURT CANNOT PRESUME THAT AFDC COVERAGE WAS INTENDED FOR PREGNANT WOMEN UNLESS CONGRESS HAS CLEARLY MANIFESTED SUCH AN INTENTION.

The judges in *Wilson v. Weaver,* 358 F. Supp. 1147, *Alcala v. Burns,* 362 F. Supp. 180, and *Doe v. Luckhard,* 363 F. Supp. 823, reached the erroneous conclusion that, if Congress didn't specifically exclude a person from AFDC then the person must be included, on a misreading of *King v. Smith,* 392 U.S. 309, *Townsend v. Swank,* 404 U.S. 282 and *Carlson v. Remillard,* 406 U.S. 598.

A sample of this misreading appears in *Wilson* where the court says at page 1152, "When confronted with claims involving an alleged conflict between state and federal eligibility standards, the Supreme Court has held that a state standard

denying assistance to persons eligible must fall unless the exclusion is clearly authorized under the Social Security Act itself or its legislative history."

The error here is that the court starts out with the assumption that unborn persons are eligible in the first instance.

The Supreme Court cases cited all start with the assumption that the statute itself clearly made these persons eligible; then the state action excluded these clearly eligible persons, but nowhere in Section 606 are "unborn persons made eligible, and as the brief has pointed out, the language of the Act and its history hold just the opposite.

In the recent case of *New York State Dept. of Social Services v. Dublino,* 41 L W 5047, 5052, the court pointed out the error of placing reliance on *King, Townsend* and *Carleson* in the same way the court in *Wilson* did.

"In those cases it was clear that the State Law excluded people from AFDC benefits whom the Social Security Act expressly provided would be eligible."

The correct rule which *Dublino* cites at page 5049 is set forth in *Schwartz v. Texas,* 344 U.S. 199, 202-203.

"If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."

The Congressional history of the Social Security Act bears this out. When the Act was first brought before the House of Representatives, Resolved into the Committee of the Whole House on April 11, 1935, Representative Doughton emphasized this state supremacy while introducing the bill. Congressional Record Volume 79 Part 5, 74th Congress 1st Session 1935, page 5469.

"Mr. Doughton: The proposed bill goes further in granting authority to the states than any similar Federal Aid legislation in recent years."

Mr. Vinson of Kentucky, later a distinguished Chief Justice of the Supreme Court, was emphatic that the states would decide need.

"Mr. Vinson: If the gentlemen will permit, the need is to be determined under State Law." Congressional Record Volume 79 Part 5 page 5471.

A careful reading of the discussion between Mr. Doughton, Mr. Claiborne and Mr. McLaughlin starting at page 5469 in the same Volume makes very clear that the state would have considerable say in who was eligible. Both *Dandridge, Hackney* and *Dublino* support this claim of considerable latitude in the state agency unless the state is expressly forbidden by the clear language of the Act.

III.

THE HEW REGULATION WILL NOT HELP THE PLAINTIFFS.

The court must ignore 45 CFR 233.90 (c) (2) (ii) which makes federal participation in payments with respect to unborn children optional.

If Congress meant child to include a fetus in section 606, then federal participation had to be mandatory. If 606 refers only to living children, then HEW had no authority to allow optional payments.

It is obvious from reading *Parks v. Harden,* 354 F Supp. 620, 625 footnote 5 how HEW came to write this regulation, and the words that the audit "should be waived" pretty well indicate HEW knew that the AFDC program was not intended to cover unborn children.

IV.

THE PLAINTIFFS HAVE NO STANDING TO BRING A CIVIL ACTION ON THE BASIS OF AN ALLEGED FOURTEENTH AMENDMENT VIOLATION.

The plaintiffs in this action are pregnant women who make the claim they are eligible for Aid to Families with Dependent Children. In *Alcala v. Burns,* 362 F. Supp. 180, 186, a case cited by the plaintiffs, the court was in error when it stated that the mother was *asserting* her rights to payments under the AFDC program.

Any rights a mother has under AFDC is a derivative one. She acts merely in the capacity of caretaker for the children, and in fact would collect *nothing* under the program without a child or children living in her home. As the court pointed out in *Parks v. Harden,* 354 F. Supp. 620, 624, in footnote 4, in the early days of the act payments were made for the child's needs only.

Because the mother is paid in a representative capacity and not as an individual in AFDC, the test becomes whether the unborn person has the constitutional right to sue.

The recent decision, *Roe v. Wade,* 35 L Ed 2d 147, 179-180, very clearly holds that the word "person", as used in the Fourteenth Amendment, does not include the unborn.

Even if the women had standing to sue, recent court decisions have clearly given Connecticut the right to choose the type of aid program they will give recipients such as the plaintiffs unless the right is based on a specific section of Title IV. *Dandridge v. Williams,* 397 U.S. 491; *Jefferson v. Hackney,* 406 U.S. 535; *Richardson v. Belcher,* 404 U.S. 78.

V.

NO TESTIMONY WAS PRESENTED ON WHICH THE COURT COULD SET A LEVEL OF BENEFITS TO BE PAID TO THE PLAINTIFFS.

In Paragraphs 3 and 4 of the court's order, the Defendants are ordered to remit the amount of benefits lost by the Plaintiffs starting from a fixed date, less any Aid to Families with Dependent Children or General Assistance benefits actually received.

The problem facing the Defendants is what amount of money must be paid each Plaintiff, not only for reimbursement from the categories stated in the order, but paid prospectively. If the lower court interprets Paragraph 10 of its order to mean that the Plaintiffs must show how much more under the Connecticut Flat Grant System they are entitled to get in some subsequent hearing before the court, then the Defendants feel that they are adequately protected and will not press this part of the appeal. If, however, Paragraphs 3 and 4 mean that a pregnant Plaintiff with no presently born children is entitled to the benefits of a flat grant family of two, or a person such as the Plaintiff Wisdom with her two born children is now entitled to the flat grant benefits of a family of four instead of three, then the Defendants say that the court order is improper.

First, it is improper because it is not specific. *Schmidt v. Lessard,* 38 L Ed 2d 661. Second, because no testimony has been presented to show that a pregnant woman's expenses are the same as a woman with children already born.

The Connecticut Aid to Families with Dependent Children Flat Grant Schedule is based solely on family size and was created to be for families where the children were actually born. All the items that went into making the AFDC family were put in the standard of need. This included special diets when necessary for pregnant woman and layette payments. *Johnson v. White,* 353 F. Supp. 69. *Rosado v. Wyman,* 397 U.S. 397.

The Defendants believe that testimony should be presented by the Plaintiffs to show whether or not a pregnant woman is entitled to be paid on the next higher family size level in the Flat Grant System.

CONCLUSION

The defendant appellant respectfully requests that the final order of the court be set aside.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BARBARA WISDOM, ET AL Plaintiffs, Appellees	)	
VS.	)	NO. T-3313
NICHOLAS NORTON, ET AL Defendants, Appellants	)	

CERTIFICATION

This is to certify that on the 29th day of March, 1974, two (2) copies of the Brief of Appellant and two (2) copies of the Appendix to Brief of Appellants was mailed to the following counsel of record:

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